

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Walter C. Chruby,	:	
Petitioner	:	
	:	
v.	:	No. 833 M.D. 2010
	:	
Department of Corrections of the	:	Submitted: March 4, 2011
Commonwealth of Pennsylvania	:	
and Prison Health Services, Inc.,	:	
Respondents	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: May 3, 2011**

In our original jurisdiction are the preliminary objections of the Department of Corrections (DOC) and Prison Health Services, Inc. (PHS) to a petition for review in the nature of a complaint filed by inmate Walter C. Chruby (Chruby). Through his complaint, Chruby claims DOC and PHS breached a settlement agreement by failing to transport him to the University of Pittsburgh Medical Center Shadyside (UPMC-Shadyside) for treatment of his long-standing kidney condition.

This case first appeared in our appellate jurisdiction by way of the consolidated appeals filed by DOC and PHS from an order of the Court of Common Pleas of Delaware County (common pleas). In that order, common pleas granted Chruby's request for an *ex parte* preliminary injunction requiring DOC and PHS to transport him to UPMC-Shadyside for treatment of an acute condition

related to his recurring kidney infection. See Chruby v. Dep't of Corr. (Chruby I), 4 A.3d 764 (Pa. Cmwlth. 2010). In Chruby I, we determined original jurisdiction over this action lies in this Court, rather than common pleas, because DOC is an indispensable party. As a result, we transferred this case to our original jurisdiction and ordered DOC and PHS to file responsive pleadings to Chruby's underlying complaint.

DOC and PHS filed preliminary objections in the nature of demurrers asserting Chruby lacks a clear right to injunctive relief. Alternatively, PHS asks that we dismiss this matter based on the pendency of a prior federal action in which Chruby also alleges DOC and PHS breached the settlement agreement. Upon review, we sustain PHS's preliminary objection based on pendency of the prior federal action, and we dismiss Chruby's state action.

We glean the following averments from Chruby's state complaint. Chruby is an inmate in DOC's custody at the State Correctional Institution (SCI) Laurel Highlands. Chruby suffers from a metabolic kidney disorder that places him at constant risk for kidney stone formation and acute pyelonephritis and urosepsis with complex antibiotic resistances. In 1987, Chruby underwent bilateral renal auto-transplantation, after which he lost his left kidney.

Chruby alleges that since 2003 medical personnel and prison officials denied him proper medical care on numerous occasions. As a result, he suffered extreme pain, underwent multiple surgeries and sustained injuries.

In 2005, Chruby filed suit against numerous defendants, including Jeffrey Beard, then-Secretary of DOC, and PHS in the U.S. District Court for the Middle District of Pennsylvania (first federal action). Approximately two years later, Chruby, Beard, PHS and several other parties entered into a settlement agreement. Chruby claims that as part of that agreement DOC and PHS agreed to transport him to UPMC-Shadyside, a tertiary care facility, when he presented with an acute kidney stone episode or pyelonephritis.

Chruby alleges that DOC and PHS almost immediately began breaching the agreement by refusing to send him to UPMC-Shadyside. Chruby alleges such actions placed his life in imminent danger.

Chruby further alleges that an issue arose when DOC and PHS transported him to the wrong hospital. Shortly thereafter, Chruby avers, counsel for PHS sent a letter confirming that the staff at SCI Laurel Highlands was aware of the requirements of the parties' settlement agreement and indicating Chruby would be taken to UPMC-Shadyside as agreed. Chruby also alleges that after he was transferred to SCI Pittsburgh (in violation of the settlement agreement) DOC's counsel indicated the move allowed for more expeditious transfer to UPMC-Shadyside.

Another issue allegedly arose in 2009 when DOC and PHS attempted to have Chruby evaluated by urologists at Conemaugh Hospital. Chruby complains taking him to Conemaugh Hospital violates the terms of the settlement agreement and that facility cannot provide the necessary level of acute urologic

care. According to the state complaint, physicians at Conemaugh Hospital previously declined to treat him because of the complexity of his condition and recommended he undergo treatment at UPMC-Shadyside. Chruby avers it is obvious his issues must be addressed at UPMC-Shadyside, the facility agreed to by the parties, where the UPMC-Shadyside urologist who performed his extremely rare renal reconstruction practices.

Chruby also alleges that in February 2010, he presented with a urologic infection that resulted in a high fever and great pain; however, DOC and PHS refused to transport him to UPMC-Shadyside. Instead, DOC and PHS again sent him to Conemaugh Hospital.

Based on these averments, Chruby seeks temporary and permanent injunctive relief in state court. Specifically, he requests an order enjoining DOC and PHS from transporting him to any medical facility other than UPMC-Shadyside for treatment, and directing DOC and PHS to fully comply with the terms of the parties' settlement agreement.

DOC and PHS filed preliminary objections, asserting Chruby's complaint is legally insufficient to state a claim for injunctive relief. In the alternative, PHS argues we should dismiss Chruby's state complaint based on the pendency of Chruby's substantially similar federal action.

We first consider PHS's assertion that we should dismiss Chruby's state complaint based on the pendency of the prior action Chruby filed in the

federal trial court. PHS asserts that Chruby filed a new federal action in the same federal trial court in 2009 (second federal action). Chruby sued DOC, several DOC employees, including its Secretary, PHS, and several of PHS's physicians. PHS maintains that in Chruby's second federal action he alleges DOC and PHS violated the settlement agreement by sending him to tertiary care facilities other than UPMC-Shadyside. Also, Chruby's second federal action seeks an injunction requiring the defendants to transport him to UPMC-Shadyside when he suffers an acute kidney episode. PHS further contends Chruby's second federal action is currently pending. As a result, PHS asserts the doctrine of *lis pendens* bars Chruby's state action, initiated in February, 2010. PHS further maintains that, although in his second federal action Chruby named other defendants and raised other causes of action, these differences do not preclude application of *lis pendens* because Chruby's rights are fully protected by the broader, federal suit.

Remarkably, Chruby agrees his state complaint should be dismissed, without prejudice, based on the pending second federal suit. Chruby asserts the continuation of his state action would constitute "duplicative, parallel litigation" and would "violate principles of comity and judicial economy as well as run the risk of inconsistent decisions." Chruby's Br. in Support of Answer to Defendants' Preliminary Objections at 9. Thus, Chruby seeks dismissal of his current state complaint.

Through its reply brief, DOC maintains *lis pendens* does not apply where, as here, the relief requested in the separate actions is different. Specifically,

DOC argues that in his second federal action Chruby requested monetary relief, while in his state action Chruby seeks injunctive relief.<sup>1</sup>

The doctrine of *lis pendens*, which is designed to protect a defendant from having to defend several suits on the same cause of action at the same time, requires more than a mere allegation of a pending suit; it requires proof that the prior case is the same, the parties are substantially the same, and the relief requested is the same. Swift v. Radnor Twp., 983 A.2d 227 (Pa. Cmwlth. 2009); Va. Mansions Condo. Ass’n v. Lampl, 552 A.2d 275 (Pa. Super. 1988); Lowenschuss v. Selnick, 471 A.2d 529 (Pa. Super. 1984). The three-pronged identity test must be strictly applied when a party seeks to dismiss a claim under *lis pendens*. Norristown Auto. Co., Inc. v. Hand, 562 A.2d 902 (Pa. Super. 1989). “As to the averment of *lis pendens* ... it is purely a question of law determinable from an inspection of the records in the two causes.” Procacina v. Susen, 447 A.2d 1023, 1025 (Pa. Super. 1982) (quoting Hessenbruch v. Markle, 194 Pa. 581, 593, 45 A. 669, 671 (1900)).

Here, PHS attached Chruby’s amended complaint in the second federal action to its preliminary objections to the state complaint. See Prelim. Objections of Def. PHS, at Ex. C. In addition, attached to Chruby’s reply to

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<sup>1</sup> In a single-sentence footnote in its reply brief, DOC also asserts *lis pendens* does not apply here because Pennsylvania courts hold that a prior, federal suit does not bar another suit in state court on the same cause of action or furnish grounds for a plea in abatement. See Thompson v. Fitzgerald, 329 Pa. 497, 198 A. 58 (1938); Wilson v. Island Creek Coal Co., 40 Pa. D. & C.2d 591 (C.P. Allegheny 1966). By raising this assertion in a one sentence footnote in its reply brief, DOC waived this argument. See Pa. AFL-CIO by George v. Commonwealth, 563 Pa. 108, 757 A.2d 917 (2000) (party waived claims that it made in passing in a footnote).

preliminary objections, is a decision from the federal trial court addressing a motion to dismiss Chruby's second federal action. See Chruby's Answer to Respondents' Prelim. Objections & Br. in Support Thereof, at Ex. A. Of relevance here, the federal trial court declined to dismiss Chruby's breach of contract claim against PHS and Jeffrey Beard, formerly Secretary of DOC, among others, arising out of the settlement agreement which resolved the first federal action. Id. at 15-16. These documents provide us with the necessary information to examine whether *lis pendens* should apply. Lampl.

#### A.

*Lis pendens* first requires the cases be the same. Here, in his state complaint, Chruby claims DOC and PHS breached the settlement agreement by failing to transport him to UPMC-Shadyside when he presents with an acute kidney episode. Likewise in Count V of his amended complaint in the second federal action, Chruby alleges a claim for breach of the same settlement agreement.

Although Chruby's second federal action involves several additional causes of action, the inclusion of these additional claims does not prevent application of *lis pendens*. This is because the second federal action, which remains pending on the breach of contract claim, includes and therefore adequately protects Chruby's state breach of contract claim. Cf. Hillgartner v. Port Auth. of Allegheny Cnty., 936 A.2d 131 (Pa. Cmwlth. 2007) (inclusion of additional claims for relief in pending federal action did not bar application of *lis pendens* to subsequent state action because pending federal action adequately protected all relief requested in state action).

**B.**

*Lis pendens* further requires the two actions involve substantially the same parties. We conclude this criterion is also met. First and foremost, the plaintiff is the same in both actions.

In addition, the defendants in Chruby's state action are substantially similar to the defendants in his pending second federal action. Both suits have DOC or its secretary as a defendant.<sup>2</sup> Also, both suits name PHS as a defendant.

Where defendants are in privity with one another, the parties are substantially the same. Hillgartner. "Generally, parties are in privity if one is vicariously responsible for the conduct of another, such as principal and agent or master and servant." Id. at 140 (emphasis added) (citation omitted). Beard's role as Secretary of DOC (or his successor) is sufficient to render him in privity with DOC, and, therefore, the parties are substantially the same.<sup>3</sup>

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<sup>2</sup> Although the federal trial court dismissed Chruby's breach of contract claim against DOC on Eleventh Amendment grounds, Jeffrey Beard, former Secretary of DOC, remains a defendant to Chruby's ongoing federal breach of contract claim. See Chruby's Answer to Prelim. Objections & Br. in Support Thereof, at Ex. A at 15-16. The status of Beard (or his successor at DOC), who signed the settlement agreement on DOC's behalf in Chruby's first federal action is substantially similar to DOC. Further, although not identified in the caption of Chruby's state complaint, Beard is named as a party on the first page of the complaint. See State Compl. at ¶2.

<sup>3</sup> Chruby's pending second federal action also names several individual DOC and PHS employees as defendants in his breach of contract claim. Clearly, employees of DOC and PHS are in privity with those entities, and, therefore, application of *lis pendens* is not precluded on the ground that Chruby did not name these employees individually in his state action. Hillgartner.



### C.

Lastly, *lis pendens* requires the same relief be sought in both actions. In his state action, Chruby essentially seeks an injunction requiring DOC and PHS to transport him exclusively to UPMC-Shadyside for treatment. State Compl. at p.10. In his second federal action, Chruby asks the federal trial court to grant an injunction directing that when he begins to suffer an acute kidney episode, Beard and PHS, among others, arrange for his transfer to UPMC-Shadyside. See PHS's Br. in Support of Prelim. Objections, at Ex. C, p.118. Although in his second federal action Chruby also seeks monetary damages, the request for additional relief does not prevent application of *lis pendens* to Chruby's state action. Hillgartner. In short, Chruby's pending second federal action, which contains a claim for injunctive relief, adequately protects any right he may have to the same relief sought in his state action.

In view of the above discussion, all requirements for application of *lis pendens* are met.

### D.

As for Chruby's prayer that his state complaint be dismissed without prejudice, we observe that *res judicata* will ultimately preclude any recovery on Chruby's state complaint. Hillgartner. *Res judicata*, or claim preclusion, prohibits parties involved in a prior litigation from subsequently asserting claims in a later action that were raised, or could have been raised, in the previous adjudication. Id. *Res judicata* shields parties from the burden of re-litigating claims with the same

parties, or parties in privity with the original litigant, and serves to protect the courts from inefficiency and confusion that re-litigation fosters. Id.

Here, Chruby seeks injunctive relief (essentially a specific performance-type remedy) based on his averments that DOC and PHS breached the settlement agreement. The same claim is proceeding in federal court. Regardless of the final resolution in Chruby's pending second federal action, it will be *res judicata* both as to claims raised there and as to claims that could have been raised there. Hillgartner.

In sum, Chruby's state complaint represents a duplication of efforts by the parties where Chruby's interests are adequately protected by his pending second federal action. *Lis pendens* is therefore appropriately applied. Id.<sup>4</sup>

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<sup>4</sup> On April 4, 2011, Chruby filed an Application for Relief in the Nature of Motion for Leave to File an Amended Complaint. Through his Application, Chruby reasserts his position that this Court should abstain from considering his state complaint based on the doctrine of *lis pendens*. Nevertheless, he asserts: "Inasmuch as interpretation of [the settlement agreement] is the crux of the issue in the case before this Court, [Chruby] requests leave to file an amended complaint to re-state the issue in the nature of a request for declaratory relief and further to raise additional interpretative questions ...." Chruby's Appl. for Relief in the Nature of Mot. for Leave to File an Am. Compl. at ¶12. DOC and PHS filed a joint answer opposing Chruby's request for leave to amend his complaint.

Because the proposed amendment to Chruby's state complaint contemplates a request for interpretation of the settlement agreement, which is directly at issue in the second federal action, the proposed amendment does not alter our conclusion that dismissal of Chruby's state complaint is proper based on *lis pendens*. Chruby's interests are adequately protected by his pending second federal action, which will resolve the parties' dispute regarding the proper interpretation of the settlement agreement.

Accordingly, we sustain PHS's preliminary objection based on the pendency of Chruby's pending second federal action, and we dismiss Chruby's state complaint.<sup>5</sup>

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ROBERT SIMPSON, Judge

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<sup>5</sup> Based on our decision to sustain PHS's preliminary objection on the ground of the pendency of a prior action, the preliminary objections in the nature of demurrers filed by DOC and PHS are rendered moot.

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Department of Corrections of the	:	
Commonwealth of Pennsylvania	:	
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**ORDER**

**AND NOW**, this 3<sup>rd</sup> day of May, 2011, the preliminary objection of Respondent Prison Health Services, Inc., on the ground of pendency of a prior action, is **SUSTAINED**, and Petitioner Walter C. Chruby's Complaint is **DISMISSED**. The preliminary objections in the nature of demurrers of Respondents Prison Health Services, Inc. and the Department of Corrections of the Commonwealth of Pennsylvania are **DISMISSED** as **MOOT**.

Further, Walter C. Chruby's Application for Relief in the Nature of Motion for Leave to File Amended Complaint is **DISMISSED** as **MOOT**.

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ROBERT SIMPSON, Judge